ment. This is true as much for back-benchers as for members of the Opposition. To contend otherwise is to denigrate from the dignity and standing of the House as one arm of the sovereignty of the nation.

This will be readily appreciated when it is realised that one of the most important of the Speaker's functions is to protect the House against the powers and encroachments of the Executive and to protect minorities within the House itself. As Colonel Clifton Brown said on his re-election as Speaker in 1945, "As Speaker I am not the Government's man, nor the opposition's man. I am the House of Common's man and, I believe, above all, the back-bencher's man." And so far as membership of the House is concerned, in the words of W.J. Brown as cited by Martin Lindsay in his booklet on the House of Commons, "The humblest back-bencher is no less than a member and the greatest Minister is no more than a member, in respect of his Parliamentary rights."

The high water mark of the independence of the House of Commons from the Executive was reached in the reign of Charles I when Speaker Lenthall resisted the attempt of the Monarch to look for and arrest five members of the House of Commons in these classic words: "May it please Your Majesty, I have neither eyes to see nor tongue to speak in this place, but as this House doth direct me, whose servant I am." Whether the independence of the Dewan Ra'ayat is to reach and be maintained at this mark, it is for the members, amongst them, the plaintiff himself, as elected representatives of the electorate in their separate constituencies for whom they speak, to decide, but quite clearly, in respect of the disqualification of the plaintiff, neither Datuk Mohamed Rahmat nor any member of the Government is interested or can vote save as a member of the House.

On such a view which with respect seems to me to be the only proper one, the Government cannot be the proper defendant from whom the reliefs sought, even if available, could be made.

Upon both conclusions, I must hold that the objection of Government is well taken. The Government is not a necessary party to the proceedings.

In the result, the plaintiff's application is dismissed with costs.

*Application dismissed.*

Solicitors: *Karpal Singh, Wong & Co.*

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## PUBLIC PROSECUTOR v. YEONG YIN CHOY

**[R.Cr.J. (Abdoolcader J.) April 21, 1976]**
**[Ipoh — Perak Criminal Revision No. 20 of 1976]**

*Criminal Law and Procedure — Offence punishable with imprisonment or fine — Whether Magistrate can exercise powers under section 294 of Criminal Procedure Code — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173A and 294.*

In this case the accused who was 29 years of age had been convicted on his plea of guilty on two charges of voluntarily causing hurt to two persons with a chopper under section 324 of the Penal Code — an offence punishable with imprisonment for a term which may extend to three years or with fine or with whipping or with any two of such punishments. The learned Magistrate on considering the age of the accused, the probation report and the circumstances of the case applied the provisions of section 294 of the Criminal Procedure Code and directed that he be released on his entering into a bond with sureties. He subsequently referred the papers in the case to the High Court for review as he doubted the correctness and legality of his order in view of the decisions of the High Court which seem to suggest that an order under section 294 of the Criminal Procedure Code can only be made where the offence is punishable with imprisonment without the option of a fine.

**Held:** the provisions of section 294 of the Criminal Procedure Code are applicable in the case of conviction for an offence punishable with imprisonment whether with or without the option of a fine or other alternative penalties and in the circumstances of the case there was no reason to interfere with the order of the Magistrate.

*Cases referred to:*

(1) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234, 235.
(2) *Re Eng Chung Lam* [1964] M.L.J. 10.
(3) *Re Badri bin Abas* [1971] 1 M.L.J. 202.
(4) *Public Prosecutor* v. *Loo Choon Fatt* [1976] 2 M.L.J. 256.
(5) *Engineering Industry Training Board* v. *Samuel Talbot (Engineers) Ltd.* [1969] 2 Q.B. 270, 274.
(6) *Lee Mun Foong v. Public Prosecutor* [1976] 2 M.L.J. 16.
(7) *Public Prosecutor* v. *Teh Ah Cheng* [1976] 2 M.L.J.

*Wan Abdul Majid bin Wan Hamid* (Deputy Public Prosecutor) for the Public Prosecutor.

Accused not present.

**Abdoolcader J.** (delivering oral judgment): The accused who is 29 years of age was convicted in the Magistrate's Court at Ipoh on March 27, 1976 on his plea of guilty on two charges of voluntarily causing hurt to two persons with a chopper under section 324 of the Penal Code — an offence punishable with imprisonment for a term which may extend to 3 years, or with fine, or with whipping or with any two of such punishments.

On the matter of sentence, the accused on his first arraignment in court, presumably in a fit of passion or depression or in a gesture of self-immolation or hopeless despair, whichever it was, promptly proclaimed his preference for the gallows, but the Magistrate wisely ignored this outrageous and bizarre request and on considering his plea in mitigation, a probation report and the circumstances of the case, applied the provisions of section 294 of the Criminal Procedure Code and directed that he be released on his entering into a bond in respect of each charge with 2 sureties in the sum of $1,000 for a period of 2 years and imposed conditions in such bonds under section 294A of the Code.

The Magistrate has now referred the papers in this case to me to review the correctness and legality of the order he made as he has since realised that there are decided authorities with regard to section 294 of the Criminal Procedure Code which would appear to preclude the application of its provisions where the offence in question is punishable with imprisonment but includes the option of a fine as is the case under section 324 of the Penal Code.

The root for the proposition I have referred to would appear to be the observation of Thomson J. (later Lord President) in *Public Prosecutor* v. *Idris*[1] (at page 235) to the effect that section 294 only avails where the conviction is for an offence punishable with imprisonment without the option of a fine. This observation was followed and applied by Gill J., (now Chief Justice) in *Re Eng Chong Lam*,[2] perhaps by implication by Sharma J. in *Re Badri bin Abas*[3] as he cited it with approval, and very recently in *Public Prosecutor* v. *Loo Choon Patt*[4] by Hashim Yeop A. Sani J. who it would seem did not actually direct his mind to the implications of this aspect as he was there more concerned with the principles of punishment applicable to the facts of that case.

It might be convenient at this stage to set out for ease of reference the provisions of subsection (i) of section 294 which are pertinent to the matter now under consideration:

"*First offenders.*

294. (i) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any court if it appears to such court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour."

The marginal note to section 294 would appear to be misleading and would not seem to reflect or project the true purpose and purport of its provisions. The essential prerequisites for the application of section 294 would be:

(a) the conviction

(b) of an adult offender (not being a youthful offender as defined in section 2 of the Code)

(c) for an offence punishable with imprisonment

(d) and it appears to the court so convicting, regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed

(e) that it is expedient that the offender be released on probation of good conduct.

It is only necessary in these proceedings for revision to consider whether or not section 294 is applicable in a case of the conviction for an offence such as is specified in section 324 of the Penal Code which provides for punishment by way of imprisonment or the alternative penalties of fine or whipping.

I have the misfortune not to be able to agree with the observation of Thomson J. in *Public Prosecutor* v. *Idris*.[1] I use the word 'observation' because it is clear that what the learned judge said with regard to the applicability of the provisions of section 294 in respect of an offence punishable with imprisonment alone without the option of a fine was clearly obiter. That was a case where the accused pleaded guilty to a charge of negligent driving in contravention of section 4(2) of the Motor Vehicles (Driving Offences) Proclamation which was punishable in the case of a first offence with fine only by reason of section 31 of the Proclamation. So clearly section 294 could not apply and the learned judge accordingly substituted the order made by the Magistrate under section 294 with a fine of $5 but went on to make the observation I have adverted to. Although Gill J. sought to apply the dictum of Thomson J. in *Re Eng Chong Lam*.[2] I would with respect point out that there again it was done only obiter as the Magistrate purported to apply the provisions of section 294 to the accused in that case without recording a conviction against him, and in those circumstances Gill J. held that the proper course was to bind over the accused under section 173A of the Code.

Section 294 of the Code provides as one of the prerequisites to the application of its provisions that there has to be a conviction for an offence punishable with imprisonment. Read literally, that may of course be taken to mean just that and no more, but I would have thought that if it were intended by the legislature to restrict the application of the provisions of that section to offences punishable with imprisonment only without the option of any alternative penalty, it would have been expressly so provided either in so many words or at least perhaps by the interpolation of the adverb 'only' in the appropriate place.

Such a literal reading however must necessarily in my view attract the application of the maxim of construction '*qui haeret in litera, haeret in cortice*' (Co. Litt. 283b) — he who considers merely the letter of an instrument goes but skin-deep into its meaning, or, perhaps more potently put, he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. It is a general rule connected with the interpretation of written instruments that where the intention is clear, too minute a stress should not be laid on the strict and precise signification of words. In interpreting a statute, it is similarly not always a true line of construction to decide according to the strict letter of the statute, and the courts may consider what is its fair meaning and expound it differently from the letter, in order to preserve the intent. Lord Denning M.R., had occasion to observe in *Engineering Industry Training Board* v. *Samuel Talbot (Engineers) Ltd.*[5] (at page 274):

"But we no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent."

The application of the provisions of section 294 to an offence punishable only with a fine would clearly be *dehors its ambit*, but I can see no reason why that statutory provision in the Code cannot and should not apply to the case of a conviction for an

offence punishable with imprisonment with the option of a fine or any other alternative stipulated punishment such as whipping as is provided for in section 324 of the Penal Code, as such an offence is surely and equally an offence punishable with imprisonment. That this is indeed so is in my view wholly substantiated and borne out by the provision in that section that "the court may, instead of sentencing him at once *to any punishment*, direct that he be released on his entering into a bond...." If that section were restricted to offences punishable with imprisonment and imprisonment only, then the words "to any punishment", which *ex vi termini* would certainly seem to transcend the confines of imprisonment *per se*, would and should instead read "to imprisonment"; the words as enacted make no sense otherwise in relation to the restrictive connotation put by Thomson J.'s dictum in *Public Prosecutor* v. *Idris*[1] on the nature of the punishment prescribed for the offence.

If a fine is the only punishment imposed for an offence, then of course the quantum of the fine can be adjusted according to the circumstances of the case and nature of the offence as such offences would not as a matter of course be very serious. In the case however of an offence punishable with imprisonment with the option of an alternative punishment by way of fine or any other penalty, it is my view that the provisions of section 294 would apply and that this would be a sensible and harmonious construction to give effect to the object and intent of the Criminal Procedure Code to provide for the release on probation of good conduct of offenders convicted for offences of a serious nature punishable with imprisonment as one of the alternative penalties imposed therefor in warranted circumstances subject to the essential requisites of its stipulated provisions, and would avoid hardship and unfairness in such cases as where if the other prerequisites to the application of section 294 were present except for this matter of the option of an alternative penalty by way of a fine and in the light of the circumstances of the case a fine and not imprisonment is imposed, the offender might well have to serve a term of imprisonment in default if unable to pay the fine which as an alternative to imprisonment would not conceivably be insubstantial. The stark disparity and inequity otherwise becomes even more pronounced and evident in a case where the alternative penalty imposed is, for example, whipping which is one of the three penalties that can be imposed under section 324 of the Penal Code.

The question of construction involved in this matter would appear not to be dissimilar to that in relation to section 13 of the Prevention of Corruption Act, 1961 which I had occasion to consider and determine in *Lee Mun Foong* v. *Public Prosecutor*[6] (and which has since on a reference been affirmed by the Federal Court) when I held the mandatory penalty imposed by that section extends to all cases where there has been acceptance of gratification irrespective of whether or not the gratification received has been recovered, and that if it were otherwise it would have been expressly so provided.

It is my firm view for the reasons I have adumbrated that the provisions of section 294 are applicable in the case of a conviction for an offence punishable with imprisonment whether with or without the option of a fine or other alternative penalties. I have indeed expressed and reflected this view with regard to section 294 previously in other cases I have dealt with on appeal and revision and more particularly in my recent decision in *Public Prosecutor* v. *Teh Ah Cheng*[7] on this point being raised on behalf of the Public Prosecutor in that case involving offences under section 9(a) of the Arms Act, 1960 which prescribes punishment by way of imprisonment or fine or both when I held that the order made by the Special President under section 294 was not illegal or invalid but was manifestly inappropriate in the circumstances of that case and the nature of the offences in question on a consideration of the general principles of sentencing discussed in the judgment I delivered.

I would think that the essential difference in the application of the provisions of section 294 and section 173A of the Code is that the latter is normally intended to be utilised in cases of minor import and calling for exceptionally mild treatment affecting adult and youthful offenders alike where the nature of the offence, the extenuating circumstances of the case and factors peculiar to the offender in question justify and perhaps even require that no conviction be recorded against him, so that although he is either admonished or cautioned or discharged conditionally as provided therein there remains no blemish or stain against him by reason of a conviction being recorded. It would appear to me that it is substantially a conviction that affects a person's standing and record for all time rather than the imposition of any penalty *per se*, as we do not as yet have any legislative provisions in our statute book on the lines of the Rehabilitation of Offenders Act, 1974 recently enacted in the United Kingdom which propounds and implements the doctrine of spent convictions. Section 294 has its parallel in relation to convicted youthful offenders in section 293 of the Code which enacts provisions for dealing with such offenders in lieu of a sentence of imprisonment or a term of imprisonment in default of payment of a fine.

The circumstances of this case and in particular the matters disclosed in the extremely competent probation report tendered clearly justified in my view the application of the provisions of section 294 of the Code and in the event there is no reason for me to interfere with the order of the Magistrate which I accordingly confirm.

*Order of Magistrate confirmed.*